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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHELL OIL COMPANY, *et al.*,
Petitioners,

v.

THE DEPARTMENT OF ENERGY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF THE PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF THE PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

This reply brief addresses new matters occurring since petitioners' original filing, as well as the arguments raised in the Department of Energy's ("DOE") brief in opposition.

I. SINCE PETITIONERS' ORIGINAL FILING, THE CONFLICT BETWEEN THE CIRCUITS CONCERNING THE SCOPE OF THE *LASALLE* DOCTRINE HAS BECOME ACUTE.

Subsequent to the filing of this petition for a writ of certiorari, the Third Circuit, sitting *en banc*, decided

SEC v. *Wheeling-Pittsburgh Steel Corp.*, No. 80-1375 (3d Cir. Jan. 21, 1981), a case involving the *LaSalle* doctrine.[1] Its decision is in direct conflict with the District of Columbia's Circuit's recent *en banc* holding in *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir.), *cert. denied*, 101 S. Ct. 529 (1980). The Third Circuit held that the *LaSalle* doctrine, which was created in the context of civil Internal Revenue Service summonses which were misused for criminal investigative purposes, applied equally to SEC subpoenas as well as other agencies' information demands, while the District of Columbia Circuit held that *LaSalle* applied "solely to the statutory scheme of the Internal Revenue Code." *Compare Wheeling-Pittsburgh*, slip op. at 11 n. 5 and 15 with *Dresser* at 1378.

This petition squarely raises the issue which this Court expressly left unresolved in *LaSalle*[2] and upon which these two *en banc* courts of appeal are in conflict. As the Third Circuit noted in *Wheeling-Pittsburgh*, "[u]p to the present time, the decisions of the [Supreme] Court have addressed only the use of civil summons authority in furtherance of a criminal investigation, and the Court therefore has had the opportunity to recognize only that abuse as a basis for invalidating an IRS summons." Slip Op. at 12-13. Thus, there is now a square conflict between *en banc* circuit courts which requires resolution by this Court in this case.

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[1] *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).

[2] In *LaSalle*, this Court stated, "[t]hese requirements are not intended to be exclusive. Future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." 437 U.S. at 318 n. 20.

II. THIS CONFLICT BETWEEN THE CIRCUITS IS RIPE FOR RESOLUTION IN THIS CASE SINCE, CONTRARY TO THE DOE'S ASSERTION, CONGRESS DID NOT INTEND THE DOE TO ACT AS THE DISCOVERY ARM OF THE ANTITRUST LAW ENFORCEMENT AGENCIES.

The DOE presents only one argument in opposition to this petition. The DOE's entire case stands or falls upon the claim that Section 52 of the Federal Energy Administration Act of 1974 ("FEA Act"), 15 U.S.C. § 790a (1976 & Supp. I 1977), manifests a clear intent by Congress that DOE should gather information in the Financial Reporting System ("FRS") for use by the Department of Justice and the Federal Trade Commission ("FTC") in antitrust prosecutions.[3] That reading of Section 52 cannot survive analysis.

The provision in question created a "National Energy Information System" which was to contain information needed to facilitate analysis of energy supply and consumption to meet the needs of the FEA (now DOE), Congress, federal officers and employees with energy-related policy decisionmaking responsibilities and the States. 15 U.S.C. 790a(a) (1976 & Supp. I 1977). The obvious meaning of the statute's text is that information should be generated for and shared with energy policymakers, a category that does not include the law enforcement officers of the Department of Justice and the FTC.[4] Congress also emphasized the FEA's "statis-

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[3] The DOE's brief in opposition also relies upon Sections 102 (12) and 205(h) of the Department of Energy Organization Act ("DOE Act"), 42 U.S.C. §§ 7112(12) and 7135(h) (Supp. II 1978). The DOE has raised no arguments which were not dealt with in the petition. (*See* Pet. at 9-14.)

[4] A review of FTC and Department of Justice energy policy duties explains why the DOE failed to identify them for this Court. Those limited Department of Justice and FTC duties which

tical and forecasting activities," making no mention of any antitrust law enforcement activities. 15 U.S.C. § 790a (b) (1976).

This interpretation is made conclusive by other principles of statutory construction. Nowhere in the legislative history of the FEA Act or the DOE Act is there any mention whatever of the radical expansion of discovery powers which the DOE now claims were deliberately conferred on the Department of Justice and the FTC. (Pet. at 9-12.) That such a revolution in the powers previously thought appropriate to prosecutorial agencies should have gone wholly unremarked by proponents and opponents alike surpasses belief. Moreover, as we showed in the petition, at 12-14, the structure of the relevant statutes forbids the DOE's conclusion.

These considerations, standing alone, are enough to demonstrate that the Department of Justice and the FTC, acting through the DOE, have usurped powers not granted them. But these considerations do not stand alone. As petitioners have shown, the DOE's reading of the statute raises serious constitutional issues by giving the Department of Justice and the FTC inquisitorial powers exceeding those they would have under a constitutionally forbidden general warrant or writ of assistance.[5] (Pet. at 15-16.)

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impact on energy policy involve review of applications for gas, oil and coal leases on federal lands, 43 U.S.C. § 1337(c) (Supp. III 1979) and 30 U.S.C. § 184(l)(2) and § 208-2 (1976); reviewing applications for deepwater port licenses, 15 U.S.C. § 788(c) (Supp. II 1978) and 33 U.S.C. § 1506 (1976); and a one-time study of subsidization of wholesale and retail motor fuel sales by vertically integrated oil companies. 15 U.S.C. §§ 2801, *et seq.* (Supp. II 1978). None of these limited "policy" duties even skims the surface of the data collected by the FRS.

[5] The DOE's argument that "[n]early all highly regulated industries are subject to periodic inspection or reporting requirements," is simply irrelevant. (Brief for Respondents at 11.) Pe-

For these reasons, the energy statutes must not be read to grant the extraordinary powers the DOE claims. Thus, the question of the applicability of the *LaSalle* doctrine is squarely raised.

III. THE RECORD BELOW ESTABLISHES THAT THE DEPARTMENT OF JUSTICE AND THE FTC REWROTE THE FRS FORM FOR USE IN THEIR LAW ENFORCEMENT ACTIVITIES.

An essential point glossed over by DOE is the extent and nature of the FTC's and Department of Justice's participation in the FRS. Neither agency approached the DOE as a "policy consultant." Indeed, each agency bluntly and candidly insisted that the DOE include data for use in their own *law enforcement* endeavors.

For example, on July 11, 1977, Assistant Attorney General John H. Shenefield sent a letter to FEA demanding changes in the FRS for antitrust law enforcement purposes. (C. A. App. 1027-30.)[6] Shenefield stated that drafting the FRS in the manner urged by Justice would "facilitate and expedite antitrust enforcement" and that company-specific FRS data should be available to Justice "on demand for specific investigations [and] litigation." (C. A. App. 1028.) On August 12, 1977, the FTC criticized the early FRS as an inadequate antitrust enforcement tool. (C. A. App. 1086.) FTC Bureau of Competition Director Alfred F. Dougherty addressed ten areas of FTC concern, stating that the FRS, as then formulated, would not permit "the development of informed antitrust initiatives" and that "[i]f the FRS data [are] to have any real usefulness to the FTC's antitrust en-

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titioners do not claim that the statutes relied upon are unconstitutional, but that they have been interpreted by the lower courts in an unconstitutional way.

[6] "C. A. App." refers to the appendix in the Court of Appeals.

forcement efforts, then that data must be made available to us on an individual company basis." (*Id.*)

The FTC and the Department of Justice reworked the FRS form from the viewpoint of antitrust litigants, as advocates involved in ongoing lawsuits—not as policy advisors enlightening a sister agency. The FTC openly acknowledged that the FRS respondents were defendants in cases the agency was "currently litigating, *Exxon Corp., et al.*, D. 8934" and that the FRS would help it prove its case. (C. A. App. 1410.)

The uncontroverted record below belies any suggestion that these antitrust agencies acted in a consultative capacity. In fact, they suggested and demanded changes in the FRS to accommodate their own law enforcement needs. The alteration of this form from 600 data elements to include more than 7200 data elements at the demand of these law enforcement agencies is a devastating response to the DOE's repeated claim that it was the so-called "ultimate decisionmaker." The ironic aspect of this case is that these facts were uncontested below. A misleading restatement of them now should not be allowed to obscure the real issue or the importance of the lower court precedent.

IV. CONTRARY TO THE DOE'S SUGGESTION, THIS CASE PRESENTS QUESTIONS OF BROAD SIGNIFICANCE CONCERNING THE PROPER RELATIONSHIP BETWEEN LAW ENFORCEMENT AND REGULATORY AGENCIES.

The DOE's attempt to paint this as a single case without general significance is entirely misleading. If left standing, the decision below will affect countless cases and investigations unrelated to the FRS. The rationale

of the opinion offers the DOE's investigative power to all federal agencies and departments who wish to use it.[7]

In addition, the decision below affects currently pending cases by permitting the FTC and the Department of Justice to use the DOE as an instrumentality for creation of antitrust law enforcement data to be used in those cases. The Court of Appeals sanctioned such uses of the FRS as that exercised here by FTC complaint counsel in the FTC's pending proceeding, *In Re Exxon Corp., pending as* FTC Dkt. No. 8934, when counsel inserted questions into the FRS. Petitioners' FRS information was also created for the Department of Justice's unit investigating alleged worldwide petroleum company price-fixing and market allocation (*See* Civil Investigative Demand Issued to Gulf Oil Corporation on August 27, 1979, reproduced at C. A. Add. 373-80.)[8]

Finally, while twenty-six energy-producing companies are presently compelled indefinitely to submit the FRS reports to DOE on an annual basis, the reporting requirement will soon be expanded to include 300 reporting companies. 44 Fed. Reg. 2578 (1979). The lower court's holding has an almost conclusive effect on any challenges to the FRS by the remaining 270 plus companies.

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[7] In 1977, several agencies including the Bureau of Census, Department of Interior, SEC, General Accounting Office and Office of Management and Budget, in addition to the Department of Justice and FTC, were invited to participate in development of the FRS. (C. A. App. 1059.) With the exception of the Justice Department and FTC, these agencies thought it inappropriate to participate directly in formulation of the FRS, except in a generalized, nonspecific manner. The judgment below paves the way for extensive involvement by these agencies and an unlimited additional number of agencies in future DOE investigations.

[8] "C. A. Add." refers to the addendum of reference materials to petitioners' brief in the Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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